

SOAH DOCKET NO. 582-07-2673
TCEQ DOCKET NO. 2007-0204-WDW
APPLICATION OF TEXCOM GULF) STATE OFFICE OF
DISPOSAL, LLC, FOR TEXAS)
COMMISSION ON ENVIRONMENTAL)
QUALITY UNDERGROUND INJECTION)
CONTROL PERMIT NOS. WDW410,)
WDW411, WDW412 AND WDW413) ADMINISTRATIVE HEARINGS

SOAH DOCKET NO. 582-07-2674
TCEQ DOCKET NO. 2007-0362-IHW
APPLICATION OF TEXCOM GULF) STATE OFFICE OF
DISPOSAL, LLC, FOR TEXAS)
COMMISSION ON ENVIRONMENTAL)
QUALITY INDUSTRIAL SOLID)
WASTE PERMIT NO. 87758) ADMINISTRATIVE HEARINGS

PREHEARING CONFERENCE
April 12, 2010

BE IT REMEMBERED THAT at 10:00 a.m., on
Monday, the 12th day of April 2010, the above-entitled
matter came on for hearing at the State Office of
Administrative Hearings, William P. Clements, Jr.,
Building, 300 West 15th Street, Room 402, Austin,
Texas, before THOMAS H. WALSTON AND CATHERINE C. EGAN,
ADMINISTRATIVE LAW JUDGE, and the following
proceedings were reported by Kim Pence, a Certified
Shorthand Reporter of:

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PROCEEDINGS

MONDAY, APRIL 12, 2010

(10:00 a.m.)

JUDGE WALSTON: Okay. We'll go on the record. This is SOAH Docket Nos. 582-07-2673 and 582-07-2674; TCEQ Docket Nos. 2007-0204-WDW and 2007-0362-IHW; the Applications of TexCom Gulf Disposal, LLC for Texas Commission on Environmental Quality Underground Injection Control Permit Nos. WD410, 11, 12 and 13, and it's Application for Environmental Quality -- excuse me -- for Industrial Hazardous Waste Permit No. 87758.

My name is Tom Walston. I'm an Administrative Law Judge with the State Office of Administrative Hearings co-presiding with ALJ Cathy Egan. Today's date is April 12, 2010, and this hearing is being held at the SOAH hearing facilities in Austin.

And it's been a while since we convened. So why don't we go ahead and have the counsel for the parties announce their appearances.

MR. RILEY: We'll start with the applicant?

JUDGE WALSTON: Yes, start with the applicant.

APPEARANCES (CONTINUED)

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MR. RILEY: Thank you. Good morning, Your Honors. For the applicant with the law firm of Vinson & Elkins, John Riley and Patrick Lee.

JUDGE WALSTON: We'll just start down at this end and work our way down and start with the county.

MR. WALKER: Good morning, Judge Walston, Judge Egan. My name is David Walker. I'm a county attorney for Montgomery County representing the aligned protestants for Montgomery County and the City of Conroe.

JUDGE WALSTON: Okay.

MR. FORSBERG: Good morning, Judges. Kevin Forsberg representing the aligned individuals in the case.

MR. HILL: Good morning, Your Honor. Jason Hill on behalf of the Lone Star Groundwater Conservation District.

JUDGE WALSTON: Thank you.

MS. GOSS: For the Texas Commission on Environmental Quality, Executive Director, Diane Goss and Don Redmond. With us today is Karen Scott from the IHW permitting team.

JUDGE WALSTON: Okay. Thank you.

MS. MENDOZA: And, Your Honor, my name

<p>1 is Mary Mendoza with Haynes and Boone. I represent 2 Denbury Onshore, LLC, who is seeking to intervene in 3 this proceeding, and I have with me several people 4 from Denbury.</p> <p>5 JUDGE WALSTON: Thank you, Ms. Mendoza. 6 And, of course, this is a prehearing 7 conference concerning the remand hearing that is 8 upcoming. The matters we want to take up today are 9 the motion to intervene by Denbury -- is that how you 10 pronounce it -- Denbury Onshore and the objections and 11 the motions to strike testimony that have been filed 12 by the Applicant, TexCom Gulf Disposal.</p> <p>13 And we want to take up the motion to 14 intervene first, and Judge Egan and I both have read 15 the --</p> <p>16 MR. RILEY: Judge, I'm sorry. I 17 sincerely apologize for interrupting.</p> <p>18 JUDGE WALSTON: Yes?</p> <p>19 MR. RILEY: We did have some folks that 20 wanted to call in to listen in on the hearing. I 21 don't know if you received a fax this morning.</p> <p>22 JUDGE WALSTON: I have not seen it.</p> <p>23 MR. RILEY: It's an individual by the 24 name of Bob May who is associated with TexCom that 25 wanted to listen in to the proceedings. The fax was</p>	<p>1 you know where we are, we've had all the parties 2 announce their appearances, and we're about to take up 3 the motion to intervene of Denbury Onshore. And as I 4 was stating, Judge Egan and I have reviewed the motion 5 and the responses, but we wanted to give the parties 6 an opportunity if there's anything they want to add.</p> <p>7 And also we noted in Denbury's 8 certificate of conference with the other parties, it 9 stated that the Executive Director opposes it, but we 10 haven't seen any filing from the Executive Director. 11 I don't know if the Executive Director wishes to 12 address it or not.</p> <p>13 But, Ms. Mendoza, it's your motion. As 14 I said, we've read the motion, but do you have 15 anything you wish to add?</p> <p>16 MS. MENDOZA: Your Honor, I do have 17 witnesses here who can testify and put evidence in the 18 record as to why we believe we should be admitted as a 19 party. Denbury has information that is fundamental to 20 the processing of this application regarding how the 21 activities of TexCom will be affected by our ongoing 22 oil and gas production operations. And we believe 23 that we have a justiciable interest, are an affected 24 party and have good cause and extenuating 25 circumstances as we've set forth in our motion to be</p>
<p>1 sent this morning from Mr. May, and we have the 2 number, if you don't mind.</p> <p>3 JUDGE WALSTON: Sure. No, that will be 4 fine. What's the number?</p> <p>5 MR. LEE: 405.286.3526.</p> <p>6 JUDGE WALSTON: Okay. And that's 7 Mr. May?</p> <p>8 MR. RILEY: Bob May, M-a-y. 9 (Discussion off the record)</p> <p>10 MR. MAY: This is Bob May.</p> <p>11 JUDGE WALSTON: Mr. May, this is 12 Tom Walston. I'm an Administrative Law Judge at the 13 State Office of Administrative Hearings, and we're 14 having a prehearing conference concerning TexCom, and 15 Mr. Riley informed me that you wish to participate by 16 telephone.</p> <p>17 MR. MAY: Yes, please.</p> <p>18 JUDGE WALSTON: Okay. Just so you 19 understand, we're in a large hearing room, and it's 20 full of attorneys and parties for all the sides. As I 21 said, my name is Tom Walston. I'm an Administrative 22 Law Judge, and also Cathy Egan is an Administrative 23 Law Judge, and we are co-presiding. Okay?</p> <p>24 MR. MAY: Okay. Thank you very much.</p> <p>25 JUDGE WALSTON: All right. And just so</p>	<p>1 admitted as a party at this time. And if you would 2 like us to put on live witnesses, we will do so.</p> <p>3 JUDGE WALSTON: We had not anticipated 4 that, but we'll let you know. We'll hear from the 5 other parties.</p> <p>6 MS. MENDOZA: Thank you.</p> <p>7 JUDGE WALSTON: Mr. Riley or Mr. Lee?</p> <p>8 MR. RILEY: We don't have much to add 9 other than it is just this morning that we learned 10 that Denbury even intended to put on live testimony. 11 Of course we would object to that. We've had no 12 opportunity to -- we certainly don't know what type of 13 testimony Denbury might offer at this point.</p> <p>14 They have submitted as part of their 15 motion some affidavits, and we assume the testimony is 16 consistent with what's in the affidavits. We regard 17 this simply as a matter of rule interpretation and a 18 matter of law not subject to factual evidence or 19 testimonial evidence.</p> <p>20 The simple question is whether TCEQ 21 rules and the posture of this proceeding allow for an 22 intervenor at this -- one, whether they ever allowed 23 for an intervenor, and two, whether they allow for an 24 intervenor at this time.</p> <p>25 Again, not to just repeat what's in our</p>

<p style="text-align: right;">10</p> <p>1 response, but it would, I think -- it's not irrational 2 to say that if it was simply a matter of "We didn't 3 know at the relevant time that there was a proceeding 4 before SOAH, and we now know and we'd like to 5 intervene," which is, I think, the digest version of 6 what Denbury is suggesting, that "We've acquired an 7 interest recently, and we now know there's a 8 proceeding that we'd like to participate in," that's 9 not good cause. That is simply a late arrival to the 10 proceeding, which is available in any case.</p> <p>11 As we talked about in our response, to 12 simplify perhaps Denbury's interest, it could be said 13 as a newly formed corporation. It could be any number 14 of different forums that this type of "good cause" we 15 could take, which would simply prevent any case, or 16 I'd say most cases, from ever reaching an end point.</p> <p>17 In this case, I think it's unique in 18 this regard. We're not talking several months into 19 the proceeding. We're talking several years into the 20 proceeding, well past the time when parties would have 21 been required under the rules to have requested a 22 contested case hearing, shown up at the preliminary 23 hearing and offered a testifying witness or at least 24 demonstrated that they are an affected person under 25 the rules and then, therefore, given party status in</p>	<p style="text-align: right;">12</p> <p>1 We don't think late arrival constitutes 2 good cause and, therefore, we oppose the motion.</p> <p>3 JUDGE WALSTON: Okay. And as I said, 4 does the ED wish to address the motion to intervene?</p> <p>5 MS. GOSS: Diane Goss for the Executive 6 Director. The Executive Director neither supports nor 7 opposes the motion.</p> <p>8 JUDGE WALSTON: Okay. Thank you. 9 Ms. Mendoza, based on what Mr. Riley said, do you have 10 any additional response you wish to make?</p> <p>11 MS. MENDOZA: I do want to say that 12 there is more than simply we have acquired a recent 13 interest for good cause.</p> <p>14 JUDGE WALSTON: Why don't you step 15 forward --</p> <p>16 MS. MENDOZA: Yes.</p> <p>17 JUDGE WALSTON: -- if you can even get a 18 chair maybe up to one of those microphones to make 19 sure you're being recorded.</p> <p>20 JUDGE EGAN: Thank you.</p> <p>21 MS. MENDOZA: There is more than 22 simply --</p> <p>23 JUDGE EGAN: You've been given a chair. 24 You're welcome to sit down.</p> <p>25 MS. MENDOZA: Thank you very much.</p>
<p style="text-align: right;">11</p> <p>1 the case.</p> <p>2 We don't have to reach the affected 3 person or affected party question because we have been 4 through all those proceedings. We have even been to 5 the Commission in this case, and we have been remanded 6 on discrete issues for additional evidence and then be 7 returned to the Commission in hopefully the near term.</p> <p>8 The long and short of it is this is 9 different even from sort of generic SOAH proceedings 10 where we have actually been through a contested case 11 hearing, and there have been numerous issues settled, 12 so to speak, by the evidentiary record in the prior 13 proceeding that have gone to the Commission. The 14 Commission has made its determination of what it wants 15 to hear in this proceeding and has instructed SOAH and 16 the parties to provide additional evidence on those 17 discrete issues.</p> <p>18 The way I interpret Denbury's motion is 19 they want to open up the issues and open up the record 20 again on issues that have been resolved by -- in the 21 initial proceeding. That's simply -- it's simply not 22 provided for in the TCEQ rules, and their reason for 23 doing that is simply that they acquired an interest 24 recently. There's no other good cause demonstrated or 25 no other offer of good cause.</p>	<p style="text-align: right;">13</p> <p>1 JUDGE WALSTON: And you really have to 2 get close to the microphone for it to pick up.</p> <p>3 MS. MENDOZA: Thank you. There is more 4 than simply a late arrival for good cause. Denbury 5 has information about the operations that are 6 currently ongoing in this field, that will be ongoing 7 in this field, that no other party to this proceeding 8 can possibly discuss that affect the fundamental issue 9 that is to be decided at this point, and that is 10 whether disposal will actually occur and how the 11 operations of an oil and gas field will impact the 12 information that has been provided to the Judges and 13 to the TCEQ by the applicant.</p> <p>14 These issues cannot be a surprise to the 15 applicant. Surely I believe that they were aware that 16 this was actually an active oil and gas field at the 17 time that they filed, and that they filed across a 18 unitized portion of the field as their injection zone. 19 That is of public record.</p> <p>20 So we are asking for a short 21 continuance, or if the applicant objects based on that 22 they would need additional time to seek discovery of 23 us, a longer continuance to bring forth critical 24 evidence that needs to be considered before a permit 25 is either issued or denied so that the correct answer</p>

<p>1 is arrived at. And I do not believe that any other 2 party in this proceeding has brought forth the kind of 3 information that we can bring forth at this time.</p> <p>4 JUDGE WALSTON: Okay.</p> <p>5 MS. MENDOZA: Thank you.</p> <p>6 MR. RILEY: Yes, just briefly. This is 7 not -- as counsel just represented, this is not a new 8 oil and gas field. It is an existing oil and gas 9 field, and as you know from the record in this case 10 has been in existence since the '30s, is my 11 recollection. Certainly it's not a surprise to us 12 that there's an existing oil and gas field in the area 13 where TexCom proposes its disposal well.</p> <p>14 What is surprising is that a newly 15 acquired interest holder -- or Denbury has recently 16 acquired their interest in this field and has 17 apparently a different perspective than the prior 18 operator. You'll recall, and I believe it's in the 19 record, that Wapiti -- Wapiti -- I'm not sure how it's 20 pronounced -- I'll go with Wapiti. Wapiti had 21 interest in this case at one time and filed a lawsuit 22 at one time and nonsuited that lawsuit, and so the 23 only thing that's changed -- the only thing that's 24 changed is now the unit operator is Denbury. All the 25 other information, and information including a letter</p>	<p>14</p> <p>1 case back for very discrete issues, and those issues 2 are to remodel using 80.9 and treat the fault as 3 nontransmissive. As a good example, it's my 4 understanding from the affidavits filed with counsel's 5 motion, they would like to argue the fault is 6 transmissive. That's been decided.</p> <p>7 (Telephonic interference)</p> <p>8 JUDGE WALSTON: Hang on one second, 9 Mr. Riley. Let me see if I --</p> <p>10 Mr. May, are you still there?</p> <p>11 MR. MAY: Yes, I am.</p> <p>12 JUDGE WALSTON: Okay. We're getting a 13 lot of static on our phone. I don't know if it's at 14 my end or your end.</p> <p>15 (Discussion off the record)</p> <p>16 MS. MENDOZA: Your Honors, if I may, I 17 can't speak for why the prior operator did not 18 intervene in these proceedings, but what I can speak 19 to is the fundamental issue that we think we have 20 evidence on that has not been provided before the 21 Judges or before the TCEQ to consider. And I do want 22 to point out that the Commission's remand order did 23 direct more modeling, but it also said that the remand 24 was to include any relevant evidence on the public 25 interest requirements and alternative disposal</p>
<p>15</p> <p>1 from the Railroad Commission, that indicates it will 2 not affect ongoing oil and gas exploration and 3 development in that area, is in the record. The issue 4 is not new. What's new is Denbury's spin on the issue 5 and Denbury's interest in retrading and rediscussing 6 issues that have been resolved in the first hearing.</p> <p>7 MS. MENDOZA: I do want to make clear, 8 as I did in our motion, that we are not arguing -- we 9 are not asking the Texas Commission on Environmental 10 Quality to decide whether this interferes with the oil 11 and gas interests. We understand where the statute 12 places that.</p> <p>13 We are saying that the operations that 14 Denbury conducts and the operations that Denbury will 15 conduct are going to -- are incompatible with what 16 TexCom is proposing to be doing, and, in fact, will 17 end up in waste being produced rather than disposed 18 of.</p> <p>19 MR. RILEY: Again -- I'm sorry. This is 20 final. Obviously the allegations made by Denbury at 21 this point were available to the prior operator of the 22 field. They were available to the other parties in 23 this case to develop those issues. Those issues have 24 been resolved.</p> <p>25 Again, the Commission has remanded this</p>	<p>17</p> <p>1 options. And certainly nothing bears more on the 2 public interest as to whether this waste, when it goes 3 down into the ground, is actually going to stay there.</p> <p>4 JUDGE WALSTON: I didn't know if -- I 5 had interrupted Mr. Riley.</p> <p>6 MS. MENDOZA: I'm sorry.</p> <p>7 JUDGE WALSTON: I wasn't sure if you 8 were finished.</p> <p>9 MR. RILEY: Before we reach the merits 10 of Denbury's position, we have to first consider, I 11 would suggest, whether Denbury -- it's appropriate to 12 admit any party at this point. Certainly any party 13 that wants to intervene is going to claim to have 14 evidence that is germane and evidence that is relevant 15 to the critical issues in the case. There's nothing 16 different in this case as to that point.</p> <p>17 What I'm trying to say and I'm not doing 18 a very good job of it is every protestant that comes 19 into the case is going to say, "I have something 20 important to say," presumably, and Denbury is no 21 different in that regard. Denbury is no different in 22 the sense that there was an existing oilfield. There 23 was an existing operator. That existing operator, for 24 whatever reasons -- I certainly don't know -- elected 25 to pursue a civil case as opposed to participating in</p>

<p>18</p> <p>1 the hearing, then elected to nonsuit that civil case. 2 Those are decisions that certainly are not my 3 understanding in terms of what I think might be what 4 Wapiti said or what happened previously. 5 The simple point we're trying to make is 6 Denbury has not demonstrated good cause for 7 participating at this point. The only cause for 8 participating at this point is the interest recently 9 acquired. Had Denbury not acquired that interest, its 10 interest in participating in this case would be 11 nonexistent. So Denbury has simply acquired a new 12 interest and now wants to participate. That's no 13 different from anybody -- any other case who comes 14 into a situation that's been going on for years and 15 then decides "We'd like to participate. We have 16 something relevant to say." The analogy -- it may not 17 be a complete one -- is for someone who moves into a 18 neighborhood. Let's suppose, for instance, some of 19 the houses in this -- in the area around TexCom have 20 been sold to new individuals and they'd like to 21 participate. Well, that would simply be a matter of 22 "I've just moved in, and so I'd like now to -- for 23 everything that's going on to be set aside and start 24 all over again." That's what Denbury is asking us to 25 do, is to start all over again, and that's simply</p>	<p>20</p> <p>1 be -- we're going to be projecting into the future is 2 their intention, but in terms of current operations, I 3 don't know of any difference between Denbury 4 operations and the Wapiti operation. 5 JUDGE WALSTON: Okay. Ms. Mendoza, do 6 you want to address that? 7 MS. MENDOZA: Denbury has plans to 8 substantially change the character of the operations 9 in this field. A number of injection wells and 10 recovery wells will be placed in this field, some 11 within the 2770-foot radius of the proposed 12 injection -- waste disposal well. It is a 13 significantly different type of operation. Denbury 14 has the current right to do that. They are the 15 operator of the unitized formation, and that includes 16 a portion of the injection zone, and that injection 17 that is planned -- and Denbury has a long history of 18 doing this throughout the United States, coming into 19 fields, starting CO2 injection, they have fields that 20 will be coming on-line such as that in Texas soon, and 21 are making plans to do the same in this to recover 22 significant reserves of oil and gas that continue to 23 exist in the Cockfield formations and will be doing 24 that. That is significantly different than what has 25 ever been done in this, and I don't believe that has</p>
<p>19</p> <p>1 unfair and should not constitute good cause in any 2 case. 3 JUDGE WALSTON: Well, let me ask this 4 question, and Judge Egan and I discussed this before, 5 is one concern that we have is that they are taking an 6 interest that someone held before and the prior owner 7 didn't intervene in the case or didn't choose to. But 8 is the proposal for CO2 injection, is that something 9 new? 10 MR. RILEY: No, sir, no. It is my 11 understanding -- 12 MS. MENDOZA: Yes. 13 MR. RILEY: Well, it may be a different 14 level, but it's my understanding there's been enhanced 15 oil recovery in the Conroe field historically. It's 16 not a new proposal. It may be a variation, it may be 17 enhanced or beyond what is currently going on, but 18 I've heard words like "What Denbury intends to do, 19 what Denbury plans to do." Those are future 20 projections, and they are certainly not present tense 21 considerations. 22 I'm assuming that if Denbury plans to do 23 additional CO2 injection, there will be a regulatory 24 involvement at that time and consideration of the 25 situation as it exists at that time. There will not</p>	<p>21</p> <p>1 been accounted for in any way in the application. 2 MR. RILEY: That's simply incorrect. It 3 is simply incorrect to say that oil and gas production 4 in the Conroe field were not considered in the first 5 portion of this case. As you know, there's a 6 requirement that the applicant obtain from the 7 Railroad Commission, who has jurisdiction and 8 authority of protecting the oil and gas production 9 interests in the state, and it has been determined by 10 the Railroad Commission that those interests will not 11 be affected. So it's simply incorrect to say that 12 that was not explored in the first go-around. 13 JUDGE WALSTON: Well, Judge Egan and I, 14 as I said, have considered the motion very carefully 15 and have discussed it, and we are inclined to allow 16 Denbury to intervene, but I want to be very clear 17 about the scope of the intervention. As Mr. Riley 18 said -- he is correct -- any impact on oil or mineral 19 interests was previously considered, and I believe, 20 Ms. Mendoza, as you stated, that's actually a decision 21 by the Railroad Commission anyway. 22 So the issue on the intervention would 23 be limited to -- and hopefully we understood your 24 motion correctly -- what impact, if any, the CO -- the 25 proposed CO2 injection activities would have on the</p>

<p>22</p> <p>1 modeling because that's the issue that we're here for 2 in this remand proceeding is the modeling and the 3 potential for migration to water supplies and so 4 forth.</p> <p>5 So a great deal of your motion addresses 6 the potential impact it might have on Denbury's 7 mineral interest. That would not be a part of this 8 proceeding. And I think -- you seem to have 9 understood that.</p> <p>10 MS. MENDOZA: Yes.</p> <p>11 JUDGE WALSTON: But I understand it 12 gives you a justiciable interest.</p> <p>13 MS. MENDOZA: Yes.</p> <p>14 JUDGE WALSTON: And we understand, as 15 Mr. Riley said -- and we agreed with Mr. Riley -- that 16 it is unusual to allow a party into the case at this 17 late stage of the proceedings. But if I understood 18 correctly, you have recently acquired this mineral 19 interest, and prior to having an acquisition, I don't 20 believe they would have had a justiciable interest to 21 intervene.</p> <p>22 And if it was just -- if there wasn't 23 anything new proposed to be going on, we would be 24 inclined to deny it, but we are concerned. And we 25 don't want to hear any of the evidence or the merits</p>	<p>24</p> <p>1 the Commission as well and not remanded. So it would 2 be -- basically a fairly narrow issue is what would 3 this proposed CO2 injection activities -- or there may 4 be something else you're going to do that would have 5 some impact on the modeling and/or create some 6 potential pathway for wastes to get to the water 7 supply.</p> <p>8 MS. MENDOZA: And I do want to make sure 9 that I understand. My reading of the Commission's 10 order is that the fault has been determined to be 11 nontransmissive in the horizontal direction, and that 12 is what has been determined. Correct?</p> <p>13 MR. RILEY: Right.</p> <p>14 MS. MENDOZA: Thank you.</p> <p>15 MR. RILEY: Well, that's not exactly 16 correct. It's horizontal -- in the horizontal 17 direction which is what creates transmissivity in the 18 vertical direction to the middle and upper Cockfield. 19 So it is determined that the fault would not allow for 20 transmission to the middle and upper Cockfield. 21 That's the modeling that we've been required to 22 produce in this hearing.</p> <p>23 You'll recall that the -- to sort of 24 visualize the stratum is the fault is not 25 transmissive, which is what causes you to consider the</p>
<p>23</p> <p>1 today what impact the CO2 injection may have on the 2 modeling that was previously conducted. That's the 3 issue that was remanded is the modeling.</p> <p>4 MR. RILEY: Well, Judges, I know you 5 know this as well as I do that -- if I understood the 6 papers at this point from Denbury, they want to argue 7 that the fault -- major fault --</p> <p>8 JUDGE WALSTON: The fault would not be a 9 part of it either.</p> <p>10 MR. RILEY: I think that fairly well 11 concludes the issue. If the fault has been determined 12 to be nontransmissive, then there's simply no way for 13 the proposed TexCom operations to affect oil and gas 14 production or CO2 injection, but I guess we'll decide 15 that.</p> <p>16 JUDGE WALSTON: That would be, yeah, 17 getting more to the merits.</p> <p>18 MR. RILEY: So I expect we won't have 19 then another round of geologic testimony arguing over 20 what the Commission has decided we need to consider in 21 this case, that the fault is nontransmissive.</p> <p>22 JUDGE WALSTON: Correct. I believe we 23 have agreed with that, and I think there was some 24 testimony that the geological formation is not 25 suitable. I believe that has already been ruled on by</p>	<p>25</p> <p>1 pressure fall-off into the middle and upper Cockfield. 2 So it's both vertical and horizontal that prevents 3 the --</p> <p>4 JUDGE WALSTON: Let me say this, and 5 we'll issue an order. I want to go back and review 6 the PFD concerning the transmissiveness. They talk 7 about new modeling assuming that it's not 8 transmissive.</p> <p>9 MR. RILEY: Right. It is assuming, but 10 here is --</p> <p>11 JUDGE WALSTON: Right.</p> <p>12 MR. RILEY: -- let me give you my take 13 on the Commission's order. In order for us to 14 consider the most conservative cone of influence, 15 meaning the largest cone of influence, the assumption 16 that would lead to a larger cone of influence is that 17 the fault is nontransmissive.</p> <p>18 JUDGE WALSTON: Nontransmissive, 19 correct.</p> <p>20 MR. RILEY: Which that's what drives us 21 to this point, the conclusion of additional wells. If 22 we go back to treating the fault as transmissive, 23 well, then we're going back to treating the cone of 24 influence as some 700 feet or whatever it was. I 25 frankly don't remember the number, but it's a</p>

<p>26</p> <p>1 relatively small cone of influence that we would then 2 discuss if that fault is transmissive in any 3 direction. So we'll see that --</p> <p>4 JUDGE WALSTON: So when we all started 5 this, what was your question or comment about the 6 transmissiveness in the scope of the remand?</p> <p>7 MR. RILEY: Yes, sir, and I think -- 8 certainly we can go back to assuming the fault to be 9 transmissive, but then that triggers a set of -- this 10 really was my initial point, is that we're going back 11 and retracing the reason we're here. We're here to 12 assume the fault to be nontransmissive. And if we 13 keep with that assumption, then we'll be discussing -- 14 we shouldn't be discussing transmissivity into the 15 middle and upper Cockfield of waste or pressure or 16 anything of that nature.</p> <p>17 JUDGE WALSTON: Okay. I'm going to have 18 to think about that because I thought the 19 transmissivity didn't necessarily have to do with the 20 different Cockfield formations as opposed to --</p> <p>21 MR. RILEY: Yeah, you'll recall, and I'm 22 sure when you go back and look at it you'll see 23 there's an assumption that the confining layer is then 24 limited to the lower Cockfield, and so we look at 25 pressure in that confining layer. That's the issue of</p>	<p>28</p> <p>1 encompassing the entire Cockfield, upper, middle and 2 lower. So that certainly -- unless the permit is 3 being amended at this point, surely we can talk about 4 where they say that their waste is going to go.</p> <p>5 JUDGE WALSTON: We'll take a look at it, 6 but what I do not want to get into is a bunch of 7 testimony about is it or is it not transmissive. That 8 would be beyond the scope.</p> <p>9 MS. MENDOZA: I do want to make sure 10 also that consistent with the Commission's order on 11 the remand saying that evidence on the public interest 12 requirements can be entered, that Denbury would be 13 allowed to discuss issues relating to the public 14 interest.</p> <p>15 JUDGE WALSTON: Do you want to respond 16 to that, Mr. Riley?</p> <p>17 MR. RILEY: Well, I don't know what's 18 planned, but I'm certain that by allowing Denbury to 19 intervene, it will be an attempt to broaden the 20 testimony beyond the technical issues we've just 21 discussed. I don't have a sense of where Denbury 22 might want to go with public interest, but I'll give 23 you an example of where I think this leads. 24 Denbury is an operator of the Cockfield 25 and it operates, I think -- this is off the top of my</p>
<p>27</p> <p>1 transmissivity. Otherwise the pressure can dissipate 2 into the upper and middle Cockfield at the point of 3 which the model can grow the injection zone based on 4 transmissivity of that fault, and that's what caused 5 the dissipation of pressure.</p> <p>6 JUDGE WALSTON: I'll have to give that 7 some thought, and we'll go back and look at it. My 8 recollection was that the injection interval was the 9 lower Cockfield --</p> <p>10 MR. RILEY: Right.</p> <p>11 JUDGE WALSTON: -- but the injection 12 zone was all three of them because it was assumed 13 there was connection between the three.</p> <p>14 MR. RILEY: That's right. And then when 15 you assume there isn't because it's nontransmissive, 16 that's what causes additional --</p> <p>17 JUDGE WALSTON: Okay. I was thinking 18 the nontransmissivity had to do with the fault that 19 was like 5400 feet out or however many feet it was.</p> <p>20 MR. RILEY: No, sir.</p> <p>21 JUDGE WALSTON: I didn't -- we'll go 22 back and review that.</p> <p>23 MS. MENDOZA: Your Honor, I would want 24 to note that there -- I believe the current draft 25 permit continues to have the injection interval as</p>	<p>29</p> <p>1 head and may not be accurate -- but some number of 2 oilfield waste disposal wells, which I believe are 3 disposal above the Jackson shale formation. There's a 4 "can of worms" that we are opening here this morning 5 in allowing Denbury to intervene.</p> <p>6 I think it has been a disingenuous offer 7 by Denbury to say "We just need 60 days to develop 8 prefiled testimony," which doesn't allow any discovery 9 on the part of TexCom. It doesn't allow us to explore 10 Denbury's operations based on their suggestion of a 11 mere 60-day postponement of this hearing. That's when 12 they would apparently drop off their prefiled and be 13 ready to go to hearing. Well, of course, that would 14 be great advantage to them, and we simply can't agree 15 to that.</p> <p>16 But on the public interest issue, there 17 is a large discussion we could have about the public 18 interest of Denbury's operations as it pertains to 19 protection of water supply. In order to prepare for 20 that, obviously we'll need time, and we'll need to go 21 into Denbury's operation.</p> <p>22 So if Denbury wants to open up the 23 public interest portion of this hearing and wants to 24 participate on what's in the public interest, 25 vis-a-vis the protection of water supply, then are we</p>

<p>1 happy to do that? Not really because we don't think 2 Denbury should be admitted at all.</p> <p>3 MS. MENDOZA: Your Honor, I do want to 4 respond briefly. I'm not sure what relevance 5 Denbury's injection practices have to the public 6 interest of TexCom's application, and it concerns me 7 that the applicant wants to spend significant amounts 8 of time looking at an issue that cannot possibly be 9 relevant to whether TexCom's injection is in the 10 public interest.</p> <p>11 MR. RILEY: Of course not, but the issue 12 is protection of the water supply.</p> <p>13 JUDGE WALSTON: What I was about to say 14 is my understanding -- and maybe the ED can help me 15 out on this a little bit -- is historically the public 16 interest concern in these cases have been very 17 limited. And, in fact, I think there's a case pending 18 at the Supreme Court now about whether you can even 19 consider traffic, and we opened it up to traffic based 20 on the court of appeals' opinion.</p> <p>21 But, Ms. Mendoza, I'm not sure what you 22 mean by "public interest." It's not just as wide open, 23 as --</p> <p>24 MS. MENDOZA: I do agree about that. I 25 think the ED, in their closing arguments or in their</p>	<p>30</p> <p>1 Director. Just a couple of comments. In the water 2 code, Injection Well Act, the part of the public 3 interest requirements or the findings that we're 4 talking about that are requisite here, 27.051(a)(1) 5 and (2). Subparagraph (1), that "the use or 6 installation of the injection well is in the public 7 interest," and then Sub (2), that "no existing rights, 8 including, but not limited to, mineral rights, will be 9 impaired." Now, these are two separate -- one thing 10 we want to point out, these are separate findings, the 11 public interest, and that the mineral rights is not 12 necessarily an issue that falls within the public 13 interest.</p> <p>14 JUDGE WALSTON: Correct. We agree with 15 that. And if this were the initial hearing, we might 16 want to do that, but it's on mineral interest. But 17 since we're on a remand and the issues are limited, 18 we're not going to open that up. So I'm not sure what 19 you're talking about as far as public interest goes.</p> <p>20 Your description of would this water 21 somehow come back up in the mineral production, I 22 don't think we would consider that as part of the 23 public interest. Yeah, our concern was getting -- as 24 Judge Egan has reminded me -- on the modeling is 25 whether somehow these CO2 injection activities or</p>
<p>31</p> <p>1 briefs to the Commission, talked about what is the 2 public interest, and that it is broader than just the 3 two things that are listed in the statute. It clearly 4 goes to the purposes of the statute as well. So there 5 are some public interest issues that we can talk 6 about. And surely one public interest issue is 7 whether disposal is actually going to occur or whether 8 it is going to be brought back up and whether that is 9 in the public interest to merely store materials in an 10 underground reservoir for a short period of time until 11 we produce them. So, you know, I'm not sure there 12 are --</p> <p>13 JUDGE WALSTON: And we'll issue a 14 written order. My initial reaction is that's getting 15 beyond the scope of what we envisioned this remand 16 proceeding would be opened up to, but Judge Egan and I 17 will discuss that.</p> <p>18 MR. RILEY: Judge, it would seem 19 appropriate if -- I'm sorry. I didn't mean to cut you 20 off. I apologize.</p> <p>21 JUDGE WALSTON: Well, I didn't know if 22 the ED -- it looked liked Ms. Goss was about to say 23 something -- I don't know if she was or not -- on 24 public interest or the scope of public interest.</p> <p>25 MS. GOSS: Diane Goss for the Executive</p>	<p>32</p> <p>1 other activities of Denbury would be providing 2 additional migration paths for the injected waste to 3 get into drinking water. That's our concern.</p> <p>4 MR. RILEY: Which is what leads to my 5 discussion about other types of waste disposal 6 activities conducted by Denbury, which I think are 7 much closer to the drinking water supply than the 8 discussion. So this waste would have to penetrate -- 9 would have to travel somehow magically through 10 Denbury's waste before it reaches the drinking water 11 supply. And you'll recall this from the original 12 hearing we talked about oil and gas disposal wells in 13 the area where that injection has occurred. We didn't 14 get into it very deeply, frankly because I think it 15 wasn't particularly relevant given the disposal is 16 occurring above the Jackson shale. So we concentrated 17 obviously on the strata below the Jackson shale.</p> <p>18 But this -- not that I expect you to 19 revisit your decision to allow Denbury to intervene, 20 but I don't think it's appropriate if Denbury does 21 intervene that our discovery of Denbury or Denbury's 22 operations cannot be limited. They would be directly 23 relevant to the question you just asked, Judge 24 Walston, is whether the additional activity by Denbury 25 would be affected -- somehow that would affect</p>
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<p>34</p> <p>1 transmissivity or somehow affect permeability or 2 somehow affect modeling.</p> <p>3 Obviously since Denbury is alleging that 4 waste injection in the lower Cockfield will affect its 5 operations, then the exact opposite is true. We need 6 to know everything about Denbury's present and future 7 operations in order to evaluate whether they are 8 credible on the issue of whether TexCom's proposal 9 would affect those operations.</p> <p>10 JUDGE WALSTON: Well, we're not going to 11 make a ruling now on what discovery may or may not be 12 relevant.</p> <p>13 MR. RILEY: I understand.</p> <p>14 JUDGE WALSTON: Right.</p> <p>15 MR. RILEY: But I don't think it should 16 be curtailed at this point by Ms. Mendoza thinking 17 this is a one-directional proceeding.</p> <p>18 JUDGE WALSTON: Right. But I did want 19 to say, too, concerning the timing and in light of, 20 you know, letting Denbury in at this late stage, we 21 did plan to be accommodating to TexCom, within reason. 22 And you-all may want to discuss it if we go off the 23 record at some point about time needed to do discovery 24 and when to set hearing or schedule.</p> <p>25 MR. RILEY: I frankly think you should</p>	<p>36</p> <p>1 responses?</p> <p>2 (No response)</p> <p>3 JUDGE EGAN: The way I like to do it is 4 just say "Everything is denied except for the 5 following that are sustained." So I'm going to go 6 through these. If you need me to slow down, tell me.</p> <p>7 Regarding the testimony of Melvin 8 Solomon, he's allowed to give his testimony, except 9 where he's asked to give an expert opinion, which 10 appears to be on Page 10, Line 19, through Page 11, 11 Line 9; Page 11, Lines 15 to 16. And let me see if I 12 can find my notes on this. And Page 11, Line 20 13 through 22, and Page 16, Line 11. Let me just make 14 sure I'm on the right one because these are all marked 15 in my book. Did you need me to go through those 16 numbers again?</p> <p>17 MR. WALKER: Judge Egan, if you don't 18 mind could you restate that first one, that line on 19 Page 10?</p> <p>20 JUDGE EGAN: Page 10, Line 19. It's 21 where "Do you have an opinion," the question, to 22 Page 11, Line 9; Page 11, Lines 15 to 16, and Lines 20 23 to 22; Page 16, Line 11.</p> <p>24 On Wilder, the objection on Page 20, 25 Lines 18 through 23, is sustained. Exhibit No. 11, I</p>
<p>35</p> <p>1 stay on the schedule that's already provided, that we 2 ought to go to hearing next week. And if Denbury has 3 some testimony it wants to offer, obviously it's had 4 some time to consider the issues. If it has some 5 prefiled testimony, then let's see it, and we'll move 6 as quickly as we can in discovery, and we'll go to 7 hearing next week.</p> <p>8 JUDGE WALSTON: Okay. We'll take a 9 break after a little while to allow the parties to 10 discuss that --</p> <p>11 MR. RILEY: Okay. Thank you.</p> <p>12 JUDGE WALSTON: -- if that's feasible or 13 not.</p> <p>14 Judge Egan has taken the lead -- we've 15 both discussed them obviously, but she's taken the 16 lead on the objections and motions to strike 17 testimony. So I'm going to turn it over to Judge 18 Egan.</p> <p>19 JUDGE EGAN: If I can find my notes on 20 it. We've gone through the objections and the 21 responses and made our rulings. Unless somebody feels 22 overwhelmed to provide additional information to us, 23 I'll just make our rulings, and then we can proceed. 24 Does anybody feel compelled to say something 25 additional to what they already put in their written</p>	<p>37</p> <p>1 have some of the same confusion I think TexCom has, 2 which is there appears to be a resume and then a whole 3 bunch of documents behind the resume. Is that -- and 4 I don't know what they are either.</p> <p>5 MR. WALKER: Your Honor, the resume, of 6 course, is Exhibit 11.</p> <p>7 JUDGE EGAN: Yeah, but if you keep going 8 back behind, there's a number of pages, and then we 9 get into something that says "The Texas Commission on 10 Environmental Quality, Industrial Hazardous Waste, 11 Registration Summary Report," and I don't know what it 12 has to do with this.</p> <p>13 MS. FORLANO: Your Honor, for the 14 record, my name is Sara Forlano with Montgomery 15 County, and I represent the aligned protestants, and 16 that was a logistical error.</p> <p>17 JUDGE EGAN: So take that out?</p> <p>18 MS. FORLANO: Just the resume was 19 supposed to be Exhibit 11. Our legal assistant added 20 the rest of the pages because we were sending 21 disclosures, and they accidentally got put in the 22 notebook.</p> <p>23 JUDGE EGAN: Okay. So the rest of that 24 can be removed?</p> <p>25 MS. FORLANO: Yes, Your Honor.</p>

<p>38</p> <p>1 JUDGE EGAN: All right. And I'm 2 removing them from our exhibit book and returning them 3 to you if you'd like to come on up and get these out. 4 JUDGE WALSTON: And just for the record, 5 those appear to be Page Nos. AP00240 through 256. 6 MS. FORLANO: Yes. 7 JUDGE EGAN: Thank you. 8 MS. FORLANO: Thank you. 9 JUDGE EGAN: Regarding Mr. Tramm's 10 testimony, Page 5, Lines 1 through 13, are sustained; 11 and Page 6, Lines 13 through 22 are sustained. 12 MS. GOSS: Your Honor, would you please 13 repeat those last two? 14 JUDGE WALSTON: For Tramm, T-r-a-m-m? 15 MS. GOSS: Yes. 16 JUDGE EGAN: Page 5, Lines 1 through 13; 17 Page 6, Lines 13 through 22. 18 Regarding Wilson -- Edmond Wilson's 19 testimony, Page 1, Line 38, through Page 2, Line 23, 20 is sustained. And Page 4, Lines 10 through 19, are 21 sustained. 22 Does anybody need me to repeat those? 23 (No response) 24 JUDGE EGAN: Okay. And on Remley, 25 Page 3, Line 5 through 13, is sustained. The</p>	<p>40</p> <p>1 So those are the objections that are sustained. Are 2 there any other issues that we need to address today? 3 MR. RILEY: Are we going to go off the 4 record awhile? 5 JUDGE WALSTON: We are. 6 JUDGE EGAN: Other than allowing you-all 7 some time to confer. 8 JUDGE WALSTON: But I was going to say 9 in going off the record and taking into account 10 scheduling, and you may be able to divine from Judge 11 Egan's discussion of the objections on evidence is 12 that although the remand was strictly -- it was 13 initially limited to modeling using the 80.9 14 millidarcies and an assumption that the fault was not 15 transmissive, we do consider TexCom's more recent 16 fracturing and retesting to be relevant in part of the 17 case as well. 18 MR. RILEY: We understand. 19 JUDGE WALSTON: Okay. So why don't we 20 go off the record. 21 MR. FORSBERG: Your Honors? 22 JUDGE WALSTON: Yes? I'm sorry, 23 Mr. Forsberg. 24 MR. FORSBERG: I'm sorry. And this may 25 not be the right realm to state this, but just for the</p>
<p>39</p> <p>1 objections are sustained. And Page 7, Lines 8 through 2 9, the objection is sustained. 3 I had a question about the individual -- 4 there was some confusion about the Exhibit 25 on the 5 individual protestants. 6 MR. FORSBERG: Correct, Your Honor. In 7 our response, I noted that we were going to divide, 8 with the court's consent, Exhibit 25 and 25 being 9 Mr. Smith's resume. Exhibit 25A would be the attached 10 documents, the other part, because both were 11 accidentally marked Exhibit 25. 12 JUDGE EGAN: Is there any problem with 13 making it clear that 25A is the attachments regarding 14 the wells? 15 MR. RILEY: Just a moment, please. 16 JUDGE EGAN: 25 will be the resume. Is 17 that correct? 18 MR. FORSBERG: Yes. 19 JUDGE EGAN: And then 25A will be -- 20 MR. FORSBERG: The well diagram. 21 MR. RILEY: There's no objection; no 22 objection. 23 JUDGE EGAN: Okay. With that 24 correction, then that objection has been withdrawn. 25 Any other questions? I think that's it.</p>	<p>41</p> <p>1 record, is scheduling really just an issue between the 2 two commercial interests? Because representing the 3 individuals who after we're all gone actually have to 4 live on top of both of what these companies are doing, 5 I'm a little bit concerned about individual's ability 6 to do discovery with Denbury and how Denbury is going 7 to impact all of this. And I was just seeing if the 8 discovery we may need to do is relevant to the 9 scheduling issue or if this is just a scheduling issue 10 between Denbury and TexCom. 11 MR. RILEY: This is probably the only 12 time I'm going to say this, but I fully support what 13 Mr. Forsberg is saying, and it's the can of worms I 14 spoke about earlier, that we're not alone in this 15 proceeding. There are Mr. Forsberg's clients I know 16 have made substantial preparation for attending the 17 hearing next week, as we have. I can't speak to the 18 costs that they've incurred at this point. And again, 19 I don't want to overdo it. Certainly Mr. Forsberg can 20 speak to his own interests or his client's interests. 21 Our client is interested in proceeding with the 22 hearing next week. Denbury's late arrival should not 23 upset that. 24 JUDGE WALSTON: Now, I'm not sure 25 exactly what you're asking, Mr. Forsberg. Certainly a</p>

<p style="text-align: right;">42</p> <p>1 new party is being admitted. If other parties want to 2 conduct discovery, I think they should be allowed to 3 conduct discovery.</p> <p>4 MR. FORSBERG: Okay. I was just going 5 to Mr. -- I'm sorry.</p> <p>6 JUDGE WALSTON: However, the scope of 7 the discovery needs to be limited to this proceeding 8 obviously.</p> <p>9 MR. FORSBERG: Oh, no, completely, and 10 we're not trying to open -- look, my folks have been 11 on this road a long time, and it's just the issue 12 of -- you know, Mr. Riley had mentioned that let's 13 proceed with the hearing next week, and I don't know 14 how anybody can do any discovery on anybody before 15 next week. I think there's interest other than the 16 commercial interests related to scheduling that, you 17 know, might be relevant.</p> <p>18 JUDGE WALSTON: Well, Mr. Riley, the 19 rule on admitting parties says, you know, for after 20 the hearing that it won't cause unreasonable delay, 21 but it doesn't prohibit any delay at all. But I do 22 agree that -- obviously TexCom has an interest in 23 moving this case forward and getting a decision on the 24 case, but you-all can discuss it. I don't know that 25 next week would be realistic.</p>	<p style="text-align: right;">44</p> <p>1 proceeding Denbury is adding or coming into now and 2 looking -- realistically in order to provide everybody 3 with their opportunity to engage in discovery and come 4 back to this same point is probably months away.</p> <p>5 JUDGE WALSTON: Well --</p> <p>6 JUDGE EGAN: We can certainly expedite 7 discovery, and it doesn't need to be months away.</p> <p>8 MR. RILEY: Then it's a burden on us, 9 Your Honor. As you know, they've had months to 10 prepare even though they say they need more months to 11 prepare the prefiled testimony. We still don't have 12 prefiled testimony for Denbury. If they really wanted 13 to step up and expedite the proceeding, they certainly 14 could have begun their preparation earlier than this 15 morning. The point is simply that we are talking 16 months.</p> <p>17 In the interim, we think it may be 18 appropriate -- and we haven't really reached a 19 decision on this -- to certify this question of 20 intervention to the Commission. If we're going to be 21 months -- if it's going to be months for us to come 22 back to this hearing, which I think it likely is, come 23 back to -- when we're ready to go to hearing, then we 24 might as well go ahead and certify the question to the 25 Commissioners and see if they agree that intervention</p>
<p style="text-align: right;">43</p> <p>1 MS. MENDOZA: And, Your Honor, we do not 2 intend to conduct discovery of the individual parties. 3 That's not our issue.</p> <p>4 JUDGE WALSTON: I understand, but they 5 may want to conduct discovery on you --</p> <p>6 MS. MENDOZA: But if they want to 7 conduct discovery of us, we certainly understand they 8 have that right and opportunity --</p> <p>9 JUDGE WALSTON: -- and the county and 10 city as well.</p> <p>11 MS. MENDOZA: -- the other parties do.</p> <p>12 MR. RILEY: Again, this gets into -- we 13 put in our motion about the -- I'm sorry. This gets 14 back to what we put in our motion is that it is -- 15 frankly, if we look at this realistically in order for 16 every party to satisfy itself on whatever issues 17 Denbury may raise, we're not talking about a several 18 week postponement. We're talking about a several 19 month postponement. We think that is terribly unfair, 20 primarily for the applicant. That's delay. It serves 21 the interests of the objecting parties. The longer 22 the proceeding takes, the more resources are consumed 23 and less likely it is that the project can go forward. 24 There are all kinds of timing issues that are 25 associated with permitting. This is a three-year-old</p>	<p style="text-align: right;">45</p> <p>1 at this point in the proceeding is appropriate.</p> <p>2 JUDGE WALSTON: I understand, and you're 3 free to do that. But I also want to make clear the 4 scope of the intervention is limited to what impact 5 their activities will have on the modeling and 6 possible paths of migration to a fresh water supply. 7 You know, the scope of the discovery that you conduct, 8 you can make it as broad or narrow as you want. 9 You're certainly free to do that.</p> <p>10 MR. RILEY: To be fair to our client, we 11 can -- sure, we can expedite our discovery to the 12 detriment of our knowledge of Denbury's operations. 13 We can do that, sure. But in order to fully 14 understand Denbury's testimony, which we can only 15 speculate right now, we'd have to engage in 16 substantial discovery to understand Denbury's issues.</p> <p>17 JUDGE WALSTON: Well, Ms. Mendoza, we 18 would hope and expect that you would have testimony, 19 you know, not today necessarily, but fairly soon. I 20 don't know if they would take a full 60 days. Or 21 maybe it would. I don't know. I don't know how much 22 preparation you have. But we can take a break and let 23 the parties discuss it. I hope you understand the 24 scope of the intervention or the issues that will be 25 allowed to be addressed by the late admission of</p>

<p style="text-align: right;">46</p> <p>1 Denbury.</p> <p>2 MS. MENDOZA: Yes.</p> <p>3 JUDGE WALSTON: Anything else?</p> <p>4 JUDGE EGAN: No.</p> <p>5 JUDGE WALSTON: All right. We'll go off</p> <p>6 the record, and I'll give the court reporter my phone</p> <p>7 number, and she can just call me when you-all are</p> <p>8 ready.</p> <p>9 (Recess: 10:53 a.m. to 11:33 a.m.)</p> <p>10 JUDGE WALSTON: Okay. We'll go back on</p> <p>11 the record. Mr. Riley, do you want to report, or who</p> <p>12 wants to report?</p> <p>13 MR. RILEY: Sure. I'm sure other</p> <p>14 parties will correct me if I misstate something.</p> <p>15 We have agreed on a hearing date -- of</p> <p>16 course, it's subject to Your Honors' schedule -- June</p> <p>17 15th.</p> <p>18 We anticipate -- although I think you've</p> <p>19 seen a list of witnesses that have been offered and</p> <p>20 you've ruled on objections, so you have some sense of</p> <p>21 how long this hearing might take. We're hoping that</p> <p>22 we can complete the hearing by Friday, June 18th, but</p> <p>23 I think we all should be a little realistic and</p> <p>24 consider not booking the 21st and 22nd.</p> <p>25 JUDGE WALSTON: Okay.</p>	<p style="text-align: right;">48</p> <p>1 JUDGE WALSTON: Well, Judge Egan is</p> <p>2 going to be out sometime in August.</p> <p>3 JUDGE EGAN: Yeah, I leave -- the 13th</p> <p>4 through the 30th I'll be gone. And I believe you're</p> <p>5 gone --</p> <p>6 JUDGE WALSTON: Early August I'm out for</p> <p>7 a bit.</p> <p>8 JUDGE EGAN: So the whole month of</p> <p>9 August, the Judges are out.</p> <p>10 MR. RILEY: Well, we calculated so that</p> <p>11 the briefing is longer, I guess, is what would give</p> <p>12 you the best opportunity --</p> <p>13 JUDGE EGAN: To get everything done.</p> <p>14 MR. RILEY: -- for your schedules. It's</p> <p>15 not ideal from the applicant's perspective, but we're</p> <p>16 much more concerned about getting the evidentiary</p> <p>17 record completed.</p> <p>18 JUDGE WALSTON: Right.</p> <p>19 MR. RILEY: And then obviously if</p> <p>20 there's some time necessary on the backside to</p> <p>21 accommodate Your Honors' schedules, then we</p> <p>22 understand.</p> <p>23 JUDGE WALSTON: Okay. And I understood</p> <p>24 from our brief -- when you phoned up there, there was</p> <p>25 some disagreement on interim schedules.</p>
<p style="text-align: right;">47</p> <p>1 MR. RILEY: I hope it doesn't take that</p> <p>2 long, Judge, but with a number of witnesses, it seems</p> <p>3 like there's the potential for us to need more than</p> <p>4 four days.</p> <p>5 JUDGE WALSTON: Right. I have a couple</p> <p>6 of little things in that period, but I think they can</p> <p>7 be re-arranged.</p> <p>8 (Discussion off the record)</p> <p>9 JUDGE EGAN: When did you anticipate</p> <p>10 doing your briefing and having it in?</p> <p>11 MR. RILEY: I'm sorry?</p> <p>12 JUDGE WALSTON: Had you-all thought</p> <p>13 about briefing?</p> <p>14 MR. RILEY: We haven't gotten that far,</p> <p>15 but I can see us having -- again, these are -- this is</p> <p>16 the second go-around, so to speak. I don't think we</p> <p>17 need the long periods typically associated with</p> <p>18 posthearing briefing. We should be briefing on</p> <p>19 discrete issues. And so I would hope that we could</p> <p>20 complete it -- I'll go rule of thumb. Instead of 30</p> <p>21 days, let's cut that in half and cut the subsequent</p> <p>22 briefing in half as well. I'm not sure if Your Honors</p> <p>23 want longer or shorter, but I can see where shorter is</p> <p>24 appropriate given the limited issues we have before</p> <p>25 us.</p>	<p style="text-align: right;">49</p> <p>1 MR. RILEY: Yes, sir. And I think --</p> <p>2 and let me make my pitch and, of course, I think it's</p> <p>3 fair for others to say their piece.</p> <p>4 But the way I look at it is given the</p> <p>5 late hour, literally a week before the hearing, and</p> <p>6 the amount of opportunity Denbury has had to consider</p> <p>7 issues in the case, we think that the prefiled should</p> <p>8 be due sooner rather than later. We don't think this</p> <p>9 should be taken as -- in the ordinary context or the</p> <p>10 course of events, the preliminary hearing, of course,</p> <p>11 and then set a discovery schedule and develop your</p> <p>12 prefiled. We think that given that these issues are</p> <p>13 discrete that the prefiled ought to be due. What that</p> <p>14 does is help us in curtailing our discovery to the</p> <p>15 prefiled testimony or issues raised in the prefiled</p> <p>16 testimony. So we suggest a two-week time frame from</p> <p>17 today for Denbury to submit its prefiled testimony.</p> <p>18 We'd also like the opportunity, given</p> <p>19 that I think it remains to be seen whether Denbury --</p> <p>20 whether we all have the same, I guess, understanding</p> <p>21 of the limited scope of their intervention; that we</p> <p>22 have a pretty short schedule there to file objections</p> <p>23 to the prefiled and rulings on those objections and</p> <p>24 then we commence discovery. And my motion there is it</p> <p>25 would help us -- and I'm not sure other parties will</p>

<p>50</p> <p>1 engage -- would be engaging in discovery -- in 2 limiting their discovery to the issues that are going 3 to be part of the hearing. 4 So we're doing a bunch of speculation 5 here, but it makes sense to me to take events 6 differently or different from the way they might 7 ordinarily be ordered so we can move expeditiously to 8 the hearing in June. So my suggestion is simply that 9 Denbury's prefiled testimony be submitted on 10 April 26th, and our objections or anyone's objections, 11 the parties objections to prefiled testimony be due on 12 April 28th. And if it's not too great an imposition 13 on the Judges, that rulings on those objections be 14 made at the end of that week. 15 From there, I think we should set a 16 discovery schedule. We haven't really focused on 17 deadlines for written discovery, but at least it's a 18 preliminary matter. To understand the full scope of 19 Denbury's intervention and its evidence, it seems 20 those would be the appropriate deadlines. 21 JUDGE WALSTON: All right. Ms. Mendoza, 22 do you want to -- 23 MS. MENDOZA: We clearly need a longer 24 period of time in which to prepare our prefiled 25 testimony. That gives Denbury essentially no time to</p>	<p>52</p> <p>1 production available to Ms. Mendoza. So I'm not so 2 worried if that's the limit of the inquiry, but new 3 discovery puts us in the box of "Well, how long will 4 we need?" I don't know. I mean, I don't have 5 anything from Ms. Mendoza indicating the breadth or 6 depth of her discovery. So arbitrarily committing to 7 an abbreviated response seems unwise at this point. 8 MS. MENDOZA: Your Honor, we have no 9 idea what discovery has been conducted. The 10 discovery, I don't believe, is filed at the TCEQ. We 11 have not been able to see that. We do not know what 12 other parties have asked for or if those parties have 13 asked for things that are relevant to the points that 14 we are going to be raising. 15 MR. RILEY: Nothing has prevented 16 Denbury from taking steps prior to this morning to 17 inform itself. 18 JUDGE WALSTON: Well, Judge Egan and I 19 will discuss it and make a decision, but part of it is 20 intervening, especially late, you kind of take the 21 case as you find it, but Judge Egan and I will discuss 22 it. 23 MS. MENDOZA: We understand we are 24 taking the case as we find it, but we do believe that 25 some limited opportunity for discovery is appropriate</p>
<p>51</p> <p>1 conduct discovery, and we do need some information 2 about TexCom's activities that is not available in the 3 record so that we can have experts develop what is 4 highly technical testimony. While we understand that 5 it is limited, we do need more time than that. We 6 propose that our testimony is due May 21st. That 7 still gives several weeks before the hearing for 8 TexCom to conduct additional discovery of us. And 9 they can be conducting discovery during the interim 10 period, as I believe they did of all the other parties 11 at the beginning of this hearing. They conducted 12 discovery before parties filed their prefiled 13 testimony. But I do not believe we can possibly put 14 together testimony in two weeks without having had any 15 discovery of TexCom. 16 JUDGE WALSTON: So I assume if you want 17 to do some discovery to TexCom before filing your 18 prefiled testimony, that you-all would be envisioning 19 compressed times to respond? 20 MS. MENDOZA: We would ask that TexCom 21 would give us compressed times to respond. 22 MR. RILEY: Judge, there's a full record 23 in this case. There's an application. There's an 24 evidentiary record. There's been production of 25 documents. I think we could easily make the</p>	<p>53</p> <p>1 so that we can actually provide meaningful and useful 2 testimony. 3 JUDGE WALSTON: Anybody else desire to 4 weigh in on our comments? 5 (No response) 6 JUDGE WALSTON: Anything else anybody 7 wants to add? 8 MR. RILEY: Not on that point. 9 JUDGE WALSTON: All right. We're going 10 to take a break for just a couple of minutes, and 11 we'll tell you what we think. We'll go off the record 12 at this time. 13 (Recess: 11:45 a.m. to 12:00 p.m.) 14 JUDGE EGAN: We're going to go ahead and 15 set the hearing on the merits for June 15th through 16 the 22nd with the caveat that the month of August 17 needs to be blocked out because both ALJs will be out 18 of town, and we need our 60 days to write the proposal 19 for decision or remanded proposal for decision. 20 So for discovery issues, first on the 21 prefiled of Denbury, that will be due May 3rd with 22 responses -- excuse me -- with objections due on the 23 5th and responses due on the 6th. All written 24 discovery must be answered within 14 days, and all 25 written answers -- so discovery has to be calculated</p>

<p style="text-align: right;">54</p> <p>1 so that all written answers are due by June 4th and no 2 later. And that is also the deadline for doing any 3 oral depositions. 4 Was there anything else? 5 JUDGE WALSTON: I think that's it. 6 JUDGE EGAN: I think that's all. 7 JUDGE WALSTON: Just so we're clear, if 8 you were to get interrogatories tomorrow, you've got 9 to answer them within 14 days. You can't just say, 10 "Well, we'll wait until June 4th." I've had that come 11 up in cases before. 12 JUDGE EGAN: Any other issues? 13 MR. FORSBERG: Your Honor, could I ask 14 one question? I don't anticipate any of my witnesses 15 would have to amend based upon discovery or supplement 16 their prefiled testimony, but is there any sort of 17 deadline if something in Denbury's prefiled testimony 18 needs to be addressed by another party's witness? 19 Because something they say or some document that they 20 may produce in discovery may alter one of my expert's 21 or one of my folk's opinions on something, I would 22 have to supplement their opinion. Again, I don't 23 anticipate it. 24 JUDGE WALSTON: Right. 25 MR. FORSBERG: I'm just trying to head</p>	<p style="text-align: right;">56</p> <p>1 deposition at a different time, if you-all can agree 2 to it in writing, that's up to you -- 3 MR. RILEY: Thank you. 4 JUDGE WALSTON: -- as long as it doesn't 5 affect the hearing date. 6 MR. RILEY: Thank you. 7 MS. GOSS: Your Honors? 8 JUDGE WALSTON: Yes? 9 MS. GOSS: Diane Gos for the Executive 10 Director. And would you please clarify in terms of 11 the parties -- the party may prefile on this deadline 12 that's the first deadline? 13 JUDGE EGAN: It's Denbury's prefiled. 14 MS. GOSS: And then you're offering an 15 opportunity for a motion for leave to file amended 16 prefiled testimony? 17 JUDGE EGAN: Yes. 18 MS. GOSS: Okay. 19 JUDGE EGAN: And it would be limited to 20 something that was brought up by Denbury in their 21 prefiled. 22 MS. GOSS: And then the possibility 23 of -- so this would be the way we would handle whether 24 or not it's going to be live testimony or any rebuttal 25 testimony would be in, whether it be live or filed, is</p>
<p style="text-align: right;">55</p> <p>1 it off if that issue comes up. 2 JUDGE WALSTON: All right. We'll say if 3 somebody thinks they need to, Denbury's is due 4 May 3rd, so the parties would have until May 14th to 5 file a motion for leave -- 6 MR. FORSBERG: Okay. 7 JUDGE WALSTON: -- not necessarily 8 granted, but a motion for leave to file additional 9 testimony. 10 MR. FORSBERG: Thank you. 11 MR. RILEY: I don't actually have a 12 calendar in front of me. I was thinking maybe May 13 10th. I had sort of the same thought. 14 JUDGE WALSTON: Yeah, that will be fine. 15 You should know because that's a week. That gives a 16 week and a weekend in there. 17 MR. RILEY: A week's time, and it's just 18 for the motion. 19 JUDGE WALSTON: Right. 20 MR. FORSBERG: That's fine. I have no 21 problem with that. I just wanted the date dealt with. 22 JUDGE WALSTON: That's a good 23 recommendation. And obviously -- I always put that in 24 my orders. If the parties reach an agreement on 25 discovery, if you need to schedule a deadline -- a</p>	<p style="text-align: right;">57</p> <p>1 in leave to file? 2 JUDGE EGAN: I believe there's already 3 an order regarding rebuttal testimony of TexCom. 4 MR. RILEY: Yes. 5 JUDGE WALSTON: Right. TexCom is -- if 6 you'll refresh your memory, is to be live, but you 7 need to designate the witnesses. 8 MR. RILEY: That's right. So that date 9 has passed. 10 JUDGE WALSTON: Right. 11 JUDGE EGAN: If you need to amend, can 12 you do it by May 10th, to add anyone? 13 MR. RILEY: And here is a suggestion and 14 see if this works for you. Since it's just going to 15 be a motion on May 10th, how we set response to those 16 motions for May 12th so if we object to -- 17 Mr. Forsberg isn't the only party to the case, but if 18 someone wants to supplement the prefiled, we can at 19 least respond to that motion by the 12th. And then so 20 where does that leave us? And then designate rebuttal 21 witnesses. 22 JUDGE EGAN: Or amend. 23 MR. RILEY: Or amend the designation of 24 rebuttal witnesses, say -- I anticipate your ruling in 25 a few days. Is that a fair --</p>

<p>58</p> <p>1 JUDGE WALSTON: Yes.</p> <p>2 MR. RILEY: -- expectation? Then just a</p> <p>3 couple of days more. So it will be the 21st. Is</p> <p>4 that --</p> <p>5 JUDGE WALSTON: May 21st is a Friday.</p> <p>6 Right?</p> <p>7 MR. RILEY: Does that give everybody</p> <p>8 enough notice and time?</p> <p>9 JUDGE WALSTON: That will be fine.</p> <p>10 Anything else any of the parties have?</p> <p>11 JUDGE EGAN: A good question. Thank</p> <p>12 you. Anything else?</p> <p>13 (No response)</p> <p>14 JUDGE EGAN: All right.</p> <p>15 JUDGE WALSTON: Okay. Then that will</p> <p>16 conclude this prehearing conference, and we'll go off</p> <p>17 the record.</p> <p>18 (Proceedings concluded at 12:04 p.m.)</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	
<p>59</p> <p>1 C E R T I F I C A T E</p> <p>2</p> <p>3 STATE OF TEXAS)</p> <p>4 COUNTY OF TRAVIS)</p> <p>5</p> <p>6 I, Kim Pence, a Certified Shorthand</p> <p>7 Reporter in and for the State of Texas, do hereby</p> <p>8 certify that the above-mentioned matter occurred as</p> <p>9 hereinbefore set out.</p> <p>10 I FURTHER CERTIFY THAT the proceedings</p> <p>11 of such were reported by me or under my supervision,</p> <p>12 later reduced to typewritten form under my supervision</p> <p>13 and control and that the foregoing pages are a full,</p> <p>14 true and correct transcription of the original notes.</p> <p>15 IN WITNESS WHEREOF, I have hereunto set</p> <p>16 my hand and seal this 13th day of April 2010.</p> <p>17</p> <p>18</p> <p>19</p> <p>20 KIM PENCE</p> <p>21 Certified Shorthand Reporter</p> <p>22 CSR No. 4595-Expires 12/31/11</p> <p>23 Firm Registration No. 276</p> <p>24 Kennedy Reporting Service, Inc.</p> <p>25 Cambridge Tower</p> <p>1801 Lavaca Street, Suite 115</p> <p>Austin, Texas 78701</p> <p>512.474.2233</p>	

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